IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.02.2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

S.A.NOS.904 AND 929 OF 1996

1.R.Chandramouleeswaran
2.R.Balasubramaniam
3.R.Gopalakrishnan
4.K.Sundaram (died)
5.K.Subburathnam
6.K.S.Santha Sundaram
7.S.Krishnasamy
8.S.Saradamani
9.S.Sivamani
10.S.Syamala
11.S.Meenakshi
12.S.Srinivasan
(Appellants 6 to 12 are impleaded and brought on record as LRs of the deceased 4th appellant vide CMPs.1744 and 1745/97 dt.4.3.1997) .. Appellants in both the appeals

Vs.

1.P.Vasudevan .. 1st respondent in SA.904/96 and 2nd respondent in SA.929/96

2.Bharat Petroleum Corporation Limited
rep, by its Zonal Manager,
7, Kodambakkam High Road,
Madras -34. .. 2nd respondent in SA.904/96 and 1st respondent in SA.929/96

3.S.K.Sellappa Gounder
4.S.Ponnammal
5.S.Subramaniam
6.S.Chandraprabha
(RR3 to 6 are impleaded vide order dt.4.11.04 made in CMPs.16701 & 16702/04) .. Respondents 3 to 6 in both the appeals

These second appeals have been preferred under Section 100 C.P.C against the order and decree passed in A.S.Nos.31 and 18 of 1993, dated 12.12.1995 on the file of the learned Subordinate Judge,

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Gobichettipalayam, reversing the judgment and decree passed in O.S.No.484 of 1989, dated 11.3.1993 on the file of the learned District Munsif, Sathyamangalam.

For Appellants : Mr.S.Parthasarathy, SC
for Mr.J.Ramakrishnan

For Respondents: Mr.V.Natarajan for R2 in SA.904/96
Mr.S.Silambanan for R1 in SA.904/96
Mr.P.Mahadevan for RR3 to 6

COMMON JUDGMENT

This judgment shall govern these two appeals, namely S.A.Nos.904 and 929 of 1996.

2.These second appeals have arisen from the judgment of the learned Subordinate Judge, Gobichettipalayam made in a common judgment made in A.S.Nos.18 and 31 of 1993, C.M.A.No.20 of 1993 and I.A.No.420 of 1995 made in that CMA.

3.The appellants in these two appeals have filed a suit for ejectment against the respondents herein in O.S.No.484 of 1989. Pending suit, the first defendant filed I.A.No.1153 of 1990 under Section 9 of the City Tenants Protection Act. On trial, the suit was decreed and the said IA was dismissed. Aggrieved over the judgment, both the defendants filed two different appeals, which were A.S.Nos.18 of 1993 by the first defendant and A.S.No.31 of 1993 by the second defendant. While the first defendant has also challenged the dismissal of I.A. in C.M.A.No.20 of 1993. The learned Subordinate Judge, on enquiry of the appeals, allowed both the appeals filed by the defendants, but dismissed the C.M.A. Aggrieved the plaintiffs, on denial of the main relief of ejectment, have brought forth these two second appeals before this Court.

4.The plaintiffs filed the suit for recovery of possession with the allegations, stating that the suit property belonged to the plaintiffs; that the plaintiffs 4 and 5 and also one Ramachandran, since deceased, are brothers; that the plaintiffs 1 to 3 were the legal representatives of the said Ramachandran; that in the year 1950, the said Ramachandran along with his brothers entered into a lease agreement with one Burmashell Oil Storage and Distribution Company for a period of 10 years; that it was subsequently extended; that thereafter, there was no extension; that a notice was issued on 20.03.1979 by the fourth plaintiff to hand over the possession; that the same was replied by the first defendant, stating that the lease was to be extended for 10 years more as per the Act 2 of 1976; that pending same, the plaintiffs 4 and 5 and their brother Ramachandran, since deceased, challenged Sections 5 and 7 of Burma Shell (Acquisition of Undertaking in India) Act 2/1976 in W.P.No.9096 of 1982; that while the same was pending, the respondents therein, who is the first respondent herein, namely Bharat Petroleum Corporation Ltd., filed counter stating that it was to be understood between the parties that it was to be extended for a further period of 10 years and after that period was over on 14.6.1989, the plaintiffs are entitled to get the suit property; that even thereafter, the first defendant issued a communication stating that

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

the they wanted to continue to occupy the site for a further period of 20 years, to which the plaintiffs were not amenable and therefore, from 15.06.1989, the defendant could not continue with the possession and hence, a demand was made by way of notice and the same was replied and under these circumstances, the suit was filed.

5.The first defendant filed an interlocutory application in I.A.No.1153 of 1990, claiming benefit under Section 9 of the City Tenants Protection Act; that what was originally leased out to Bharmah Shell Oil Storage and Distributing Company of India Ltd. was only 6534 Sq. feet and subsequently, the lease period was extended then and there; that it actually came to the hands of the Bharat Petroleum Corporation, the first defendant; that superstructure has been raised by the tenant and thus, they were prepared to purchase the same and hence, they are ready to take up the same for a reasonable price as fixed by the Court and hence, it was to be ordered.

6.The second defendant resisted the suit, inter-alia, stating that he was a retail dealer under the first defendant; that the decision of this Court in W.P.No.9096 of 1982 would not bind on him and that no relief of recovery of possession could be asked against him.

7.The trial court, after framing necessary issues, tried the suit along with the interlocutory application. On trial, the suit was decreed, but the interlocutory application filed under Section 9 of the Act was dismissed. Aggrieved the defendants took the matter in appeals, two in number, as referred to above and the first defendant filed CMA against the order passed in the I.A. Insofar as CMA was concerned, the same was dismissed. It is also an admitted position that CRP, directed at the instance of the first defendant, was also dismissed and thus, it has reached finality. Insofar as the appeals are concerned, they were allowed in favour of both the defendants. Hence, these second appeals, at the instance of the plaintiffs.

8.After hearing the learned counsel, the following substantial questions of law are formulated:

> "a)Whether Section 11 cannot be invoked by first respondent who was found by the trial court to be not in actual possession and hence not a 'tenant' as defined under the Act, which finding was not reversed or set aside by the lower appellate court?
>
> b)Whether the lower appellate court did not apply the principles laid down in 95 L.W. 412 correctly to the facts of the case and ought to have found that first respondent, having filed I.A.1153/90 long prior to his written statements had not waived his right to raise the plea of want of notice under Section 11 of the Act."

9.Advancing his arguments on behalf of the appellants, the learned Senior Counsel, inter-alia, would submit that it was a suit for ejectment filed by the plaintiffs against the defendants; that the application filed by the first defendant under Section 9 of the Act, claiming right to purchase the land was denied by all the courts and that it has reached finality also; that the trial court has marshalled the evidence and has decreed the suit, but the first appellate court has denied the relief only on technical ground that in the instant case, there was no notice issued

https://hcservices.ecourts.gov.in/hcservices/

under Section 11 of the City Tenants Protection Act as contemplated under the City Tenants Protection Act, granting three months time; that in the instant case, that right has been waived by the defendants, in particular by the first defendant by filing application under Section 9 of the Act and there was a writ petition pending between the parties, in which also it was understood that there was an extension for a period of 10 years, which came to an end in the year 1989 and thereafter, either the first defendant or the second defendant could not be allowed to continue to be in possession; that this plea that they are entitled to protection under the provisions of City Tenants Protection Act was never raised in the writ petition and apart from that, the first appellate court relied on a decision of this Court reported in 95 LAW WEEKLY 412 (SRI AGASTHEESWARAR PRASANNA VENKATESA PERUMAL DEVASTANAM BY ITS HEREDITARY TRUSTEE, P. VALIAMMAL VS. NARASIMHAN), wherein it has been held that the suit was not maintainable, since Section 11 notice, as contemplated, was not issued and without issuing such notice, the suit for ejectment should not be filed; that further, it was found that the decision, as referred to above, squarely applies to the present facts of this case and following the same, there is no option for the court to dismiss the suit. But, in the instant case, they have not raised such a plea in the writ petition either, or pending proceedings; that they have filed an application under Section 9 of the Act, but failed therein; and that no question of non issuance of notice under Section 11 of the Act would arise.

10.Added further the learned Senior Counsel that this legal plea could be raised and available only to the person, who falls within the definition of tenant, as found in the City Tenants Protection Act; that the learned Senior Counsel took the Court to the definition of the tenant under Section 2(4) of the Act and has pointed out that so long as the first defendant is unable to show that he is in actual physical possession of the land in question, he cannot claim any benefit or cannot call for notice under Section 11 of the Act. Hence, the judgment of the first appellate court has got to be set aside and the judgment of the trial court has got to be restored.

11.Contrary to the above, the learned counsel appearing for the respondents would submit that in the instant case, originally, there was a tenancy agreement between the plaintiffs 4 and 5, their brother one Ramachandran and Burmashell Oil Storage and Distribution Company in the year 1950; that it was extended then and there; that it was actually taken over by the Bharat Petroleum Corporation Ltd., the first defendant; that there was proceedings in the writ petition between the parties and it was also withdrawn and under these circumstances, no question of waiver of notice would arise; that in the instant case, for filing suit for ejectment, when the land belonged to the plaintiffs and the superstructure was admittedly raised by the defendants, issuance of notice under Section 11 of the Act is a mandatory one; that if the provisions of the act was not complied with, there was no option than to dismiss the suit; that in the case, where Section 9 application was not filed, the Courts have repeatedly held that if section 11 notice has not been issued, the suit should have been dismissed; that in the instant case, the first appellate court has rightly followed the decision of this Court, referred to above and has found that the said case is applicable to the present facts of this case and hence, rejected the claim.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

12.Added further the learned counsel that in the instant case, the contention put forth by the learned Senior counsel for the appellants that the first defendant is not in physical possession, has got to be rejected; that there was tenancy agreement between the plaintiffs 4 and 5, their brother Ramachandran and Burmashell Oil Storage and Distribution Company in the year 1950; that there was an extension of tenancy agreement and subsequently, the first defendant took over Burmashell Oil Storage and Distribution Company; that after it came to the hands of the first defendant, there was writ petition pending before the court and there was no denial of tenancy between them; and that at this juncture, the plaintiffs should not have been allowed to say that the first defendant was not the tenant.

13.Added further the learned counsel that so long as the agreement between the parties is an admitted position and the rent has also been paid by the first defendant in the past, no question of denial of the same would arise; that the learned counsel also took the Court to the provisions under Section 2(4) of the Act and contended that the 'Tenant' in relation to any land means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied; that in the instant case, the first defendant is the tenant, to whom the provisions of the Act are applicable; that both the courts below have rejected the application under Section 9 of the Act not holding that he was not the tenant, but on the other grounds and under these circumstances, the plaintiffs/appellants should not be allowed to raise such a contention for the first time before this Court and hence, it has got to be rejected and the judgment of the first appellate court has got to be sustained.

14.The Court has paid its anxious consideration on the submissions made. It is not in controversy that the landed property in question, originally, belonged to the plaintiffs 4 and 5 and their brother Ramachandran, since deceased. Pending the second appeal, they have sold the property. It is not in controversy that originally, the tenancy agreement was entered into between the plaintiffs 4 and 5, their brother Ramachandran and one Burmashell Oil Storage and Distribution Company; that it was from time to time extended; that subsequently, it was taken over by the first defendant, namely Bharath Petroleum Corporation Limited. At this juncture, it is to be pointed out that when the suit for ejectment was filed, an application was filed under Section 9 of the City Tenants Protection Act, by the first defendant. On failure, it took up CMA and the CMA was dismissed and a civil revision petition was filed and the same was also dismissed and hence it has reached finality. Under these circumstances, no question of claiming any right under Section 9 of the Act would arise, since it has reached finality.

15.The trial court has decreed the suit. The first appellate court made a reversal of the judgment, stating that in the instant case, notice under Section 11 of the Act should have been issued, which is a mandatory one and there was no waiver of notice by filing application under Section 9 of the act. For that, the learned Subordinate Judge followed the Bench decision, as referred to above. It is made clear that this Court cannot have any quarrel over the said judgment. The only question is whether the said judgment could be applied to the present facts of the case and this court is of the considered opinion that it is highly difficult. When the question of application of the said judgment would arise, the first defendant has to show himself as a tenant under the City Tenants

https://hcservices.ecourts.gov.in/hcservices/

Protection Act. If he is unable to show the same, no question of application of the decision would arise. In a given case, where no notice is given under Section 11 of the City Tenants Protection Act, it is a well settled proposition of law that even if application under Section 9 of the Act, claiming benefit, has not been filed, the defendant can claim the benefit on legal positions that non issuance of notice was fatal to the plaintiff's case. But, this is applicable to the case where the defendant is able to show himself as a tenant, as contemplated under the provisions of City Tenants Protection Act.

16.In the instant case, the next question that would arise is whether the first defendant can be termed as tenant as contemplated under Section 2(4) of the City Tenants Protection Act. It would be apt and appropriate to reproduce the definition of term 'Tenant':

> "(4)'Tenant' in relation to any land-
>
> (i)means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied, and
>
> (ii)includes-
>
> (a)any such person as is referred to in Sub-Clause (i) who Continuous in possession of the land after the determination of the tenancy agreement.
>
> (b)any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub section (3) of section 1 and who or any of his predecessors in interest had erected any building on such land and who continuous in actual physical possession of such land and building, not withstanding that-

A reading of the above would clearly reveal that as rightly pointed out by the learned Senior Counsel for the appellants, in order to claim the benefit under the provisions of the City Tenants Protection Act, one should be in continuous and actual physical possession of such land and building. In the instant case, it is not the case of the first defendant that he is in actual physical possession of the land. Admittedly, the second defendant, who is the retail dealer, has been in actual possession all along. There is distinction between the actual physical possession and legal possession. In the instant case, it is true, the first defendant is in legal possession, but he is not in actual physical possession of the land, but it is only the second defendant. It was not the second defendant, who claims the benefit under Section 9 of the Act, but it was the first defendant, who claims the benefit and the same was denied and it has reached finality by the order of this Court in CRP. The learned Senior Counsel appearing for the appellants has relied on the decisions of this Court reported in MANU/TN/2672/2006 VOLUME 7, PART 26 (P.R.AITHALA ALIAS P.RAMAKRISHNA AITHALA VS. HINDUSTHAN PETROLEUM CORPORATION LIMITED, MADRAS) and 2007 (1) CTC 67 (MALINI PARTHASARATHY VS. HINDUSTAN PETROLEUM CORPORATION LTD.). The Court is of the considered opinion that these decisions have got an application to the present facts of this case.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

17.So far as the contention put forth by the learned counsel for the respondents that the tenant means a person liable to pay rent in respect of such land under the tenancy agreement express or implied, is concerned, the Court is of the considered opinion that in the instant case, it was determined long back and apart from that the writ petition was filed and one time, it was extended by 10 years and thereafter, there was no extension and therefore, no tenant and landlord relationship would continue. Apart from that, in the instant case, merely because a person is liable to pay rent in respect of the land, though not continuous in actual physical possession of the land, he cannot, in the opinion of the Court, be termed as a tenant under the said Act. The first defendant, who is not in actual physical possession of the land, though in legal possession, cannot be termed as tenant as contemplated under the provisions of the Act and hence, he cannot claim benefit under the Act. So long as the first defendant is unable to show that he is a tenant under the provisions of the Tamil Nadu City Tenants Protection Act, he cannot ask for issuance of notice under Section 11 of the Act. Hence, question of waiver or not does not assume importance in the instant case.

18.In order to find out whether a person is a tenant as contemplated under the provisions of the Act, a conjoint reading of the provisions has become necessary. A person who is liable to pay rent, but not in actual physical possession of the land, cannot claim himself as a tenant. Equally, a person who is in actual physical possession of the land, if not a person liable to pay rent, cannot also claim as a tenant under the provisions of the Act. The legislative intent was to give benefit to those tenants, who are in actual physical possession of such land and buildings continuously. Thus, a person to call himself as a tenant in order to get the benefit of the legislation, must show that he is not only liable to pay rent under the agreement, but also in continuous actual physical possession of the land and building in question. In the instant case, the first defendant is unable to show itself as a tenant under the provisions of the Act and hence, it cannot be allowed to put forth the defence plea, stating that the issuance of the notice under Section 11 of the Act was mandatory and since the said provision was not complied with, the suit required an order of dismissal. Therefore, the said contention has got to be rejected. The First appellate court, without considering this aspect that the first defendant cannot claim itself as a tenant under the provisions of the Act, has erroneously dismissed the suit, agreeing with the defence plea that the suit was technically defective by the non issuance of the notice under Section 11 of the said Act. In such circumstances, without any hesitation, the judgment of the first appellate court has got to be set aside.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

19.In the result, the judgment of the first appellate court is set aside. Both the second appeals are allowed. No costs. Three months' time is granted to the defendants for handing over the possession.

vvk

Sd/-
Assistant Registrar,

/ture copy/

Sub Assistant Registrar.

To

1.The Subordinate Judge,
Gobichettipalayam.

2.The District Munsif,
Sathyamangalam.

3. The Record Keeper, V.R. Section,
High Court, Chennai.

+ One cc to Mr. P. Mahadevan Advocate SR 7140
+ Two CCs to Mr. CV. Nataraj Advocate SR Nos. 7312 & 7313.

PV (co)
sg 28/2/07

S.A.NOS.904 AND 929/1996

06.02.2007

सत्यमेव जयते
WEB COPY

https://hcservices.ecourts.gov.in/hcservices/